Supreme Court, U.S.
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No. 01-810

In the

Supreme Court of the United States

BYRON Z. MOLDO, Chapter 7 Trustee of the Estate of CYBERNETIC SERVICES, INC., d/b/a Silent Radio, Inc.,

Petitioner,

versus

MATSCO, INC., and
MATSCO FINANCIAL CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether state law governs the perfection of modern security interests in patents notwithstanding the language of Section 261 of the Patent Act[1]?

2. Whether the bankruptcy trustee's "strong arm" powers under Section 544(a) of the Bankruptcy Code[2] have any bearing on the result below?

3. Whether the perfection of modern security interests in patents concerns a substantial question of patent law or even implicates the Patent Act?

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[1] The Patent Act of 1952, as amended, 35 U.S.C. §§ 1-376 (1999).

[2] The Bankruptcy Reform Act of 1978, as amended, 11 U.S.C. §§ 101-1330 (2000).

CORPORATE DISCLOSURE STATEMENT

RESPONDENTS, MATSCO, INC. and *MATSCO FINANCIAL CORPORATION ("Matsco")*

The Respondents were wholly owned subsidiaries of The Matsco Companies, Inc. which was acquired by Greater Bay Bancorp on November 30, 2000. The Matsco Companies, Inc. was merged into Greater Bay Bancorp which subsequently contributed the assets to Cupertino National Bank, a wholly owned subsidiary of Greater Bay Bancorp, a publicly held company. Matsco is now a division of Cupertino National Bank.

There are no publicly held companies owning ten percent or more of the stock of Greater Bay Bancorp.

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STATUTES INVOLVED

In addition to the constitutional and statutory provisions cited in the Petitioner's (hereinafter referred to as the "Trustee") Petition, the relevant statutory provisions in this matter include former California Commercial Code §§ 9-104(a), 9-106, 9-302(1) and (3)(a).[1] (App. 73-78, R. App.)[2]

For reasons more fully set forth hereinbelow, Respondents do not believe that the Supremacy Clause of the United States Constitution nor the Section 544(a)(1) of the Bankruptcy Code or 28 U.S.C. § 1295(a) are controlling in this matter.

STATEMENT OF THE CASE

Respondents (also referred to as "Matsco") hereby adopt the factual and procedural background of the case as set forth by the Ninth Circuit in In re Cybernetic Services, Inc., 252 F.3d 1039, 1044 (9th Cir. 2001) (App. 3-4.)

In addition to the foregoing and the Statement contained in the Petition, the Bankruptcy Court's Findings of Fact and Conclusions of Law Granting Relief from Stay to Foreclose Patent Lien recited that the parties "agreed that a determination as to whether Matsco has a perfected security interest in the patent is dispositive of Matsco's relief from stay motion. As Matsco perfected its security interest in the patent before the filing of the Bankruptcy Petition, Matsco's

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[1] California has adopted its version of the Revised Article 9, effective July 1, 2001, which is codified at Cal. Comm. Code §§ 9-101 - 9-709. Since the new provisions do not intend to alter the result of the former statute with respect to intellectual property, all references in this Brief will be to the former provisions of California's version of Article 9 (frequently referred to as the "California Commercial Code" or just the "Commercial Code").

[2] Citations to the Petitioner's Appendix will be cited as "(App. __.)" and to the Appendix hereto as "(R.App. ___.)".

interest in the patent has priority over the Trustee's claim in a patent." (App. 47.) On appeal of these findings to the Bankruptcy Appellate Panel, the Trustee neither briefed nor argued his status as a hypothetical judgment lien creditor or execution creditor under the provisions of §544(a)(1) and (2) of the Bankruptcy Code. Furthermore, upon denial of the Trustee's Motion to Transfer the appeal from the Ninth Circuit to the Court of Appeals for the Federal Circuit, entered June 1, 2000, the Trustee did not seek reconsideration, rehearing or other review of the Ninth Circuit's Order. Based upon the Ninth Circuit's denial of the Trustee's petition for rehearing on August 2, 2001, the Trustee's Petition herein appears to have been timely.

REASONS FOR DENYING THE WRIT

The Respondents Matsco, Inc. and Matsco Financial Corporation ("Matsco") respectfully request that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's opinion in this case. The only issue presented by the Petition is whether state law rather than any provision of the Patent Act governs the perfection of modern commercial security interests in patents. The Petitioner's postulation of two subsidiary issues pertaining to Federal Circuit Court of Appeals' jurisdiction and a bankruptcy trustee's status as a bona fide purchaser are not germane to this case for the reasons more fully set forth below. Moreover, this is simply not an appropriate case for this Court to grant a writ of certiorari.

I. THIS CASE PRESENTS NONE OF THE TRADITIONAL REASONS FOR GRANTING A WRIT OF CERTIORARI

Even without addressing the patent lack of legal merit to the Petition, this case does not warrant review by this

Court under the usual considerations governing a review on certiorari.

A. The Ninth Circuit's Opinion Is Consistent With The Decisions Of All Other Courts Which Have Considered The Issue.

Notwithstanding the Trustee's effort to substantiate its position with ancient and irrelevant statutes and cases, all of the case law on the means to perfect modern security interests in patents agrees that the appropriate and exclusive method of perfection is the filing of a financing statement under the Commercial Code. For instance, in the case of Holt v. United States, 73-2 U.S. Tex. Cas. (CCHN) ¶ 9680, at 82202 (D.D.C. 1973), the court determined that not only is it possible to take a lien on a patent application, but that the security interest is perfected by means of a UCC filing. Id at 82203. Similarly, the bankruptcy court in In re Transportation Design & Technology, Inc., 48 B.R. 635 (Bkrtcy. S.D. Cal. 1985) agreed that perfection of a security interest in a patent, as opposed to a transfer of title, need not be filed with the Patent and Trademark Office ("PTO"). Id. pp. 689-40. Transportation Design was cited with approval in City Bank & Trust Co. v. Otto Fabric, Inc., 83 B.R. 780, 782 (D.Kan. 1988) in which the district court held that the Commercial Code filing was sufficient to perfect the creditor's security interest in a patent, and that it was not necessary to transform the security interest into an assignment and then record it at the PTO. Id. at 784. Furthermore, the most recent decision in this area is also in accord with these cases. Chesapeake Fiber Packaging Corp. v. Sebro Packaging Corp., 143 B.R. 360, 362 (D.Md. 1992), aff'd 8 F.3d 817 (4th Cir. 1993). Again citing Transportation Design with approval, the district court rejected the argument that the creditor needed to file with the PTO rather than under the provisions of the Commercial Code in order to perfect its security interest.

The Petition intentionally misreads these cases as having decided that security interests are transfers within the ambit of section 261 of the Patent Act. (Petition, p. 8.) In fact, the Trustee relies upon dictum in the Transportation Design case which opined that "if the secured creditor wishes to protect itself against the debtor transferring title . . . then the secured creditor must bring its security interest (which is not ordinarily a transfer of title) within the provisions of the Patent Act . . . ." 48 B.R. at 639-40. Not only was this statement unnecessary to the decision that the creditor was properly perfected, but hardly stands as support for the Trustee's sweeping statement that "courts have agreed that a security interest must be recorded in the PTO for priority over a later bona fide purchaser." (Petition p. 8.) The dictum in Transportation Design is at odds with the court's own holding and has been roundly criticized as unnecessarily creating a potential anomaly. See, Haemmerli, "Insecurity Interests: Where Intellectual Property and Commercial Law Collide," 96 Colum. L.Rev. 1645, 1702-04 (1996). The Ninth Circuit has now corrected any potential problem associated with such dictum by holding that "the Patent Act does not cover security interests or lien creditors at all . . . ." In re Cybernetic Services, supra, 252 F.3d. at 1057. (App. 33.)

Although trademarks represent a vastly different form of intellectual property than patents and are governed by a separate statute, the cases involving trademarks have left no doubt that an analogous federal statutory scheme for registration of modern security interests in trademarks does not exist. In the case of In re 199Z, Inc., 137 B.R. 778 (Bkrtcy. C.D. Cal. 1992), the bankruptcy court held that the filing of a financing statement under the California Commercial Code was necessary and sufficient to perfect a security interest in a trademark. Id. at 782. The court noted that its conclusion was in harmony with those of other bankruptcy courts, citing both In re Hoeppner, 41 B.R. 128

(Bkrtcy. C.D. Cal. 1984) and In the Matter of Roman Cleanser Co., 43 B.R. 940 (Bkrtcy. E.D. Mich. S.D. 1984) aff'd 804 F.2d 207 (6th Cir. 1986). In carefully distinguishing assignments and other transfers of title from modern security interests, the court was clearly in accord with the prior decisions determining the effect of the statutory scheme. See also, In re Chattanooga Choo-Choo Co., 98 B.R. 792 (Bkrtcy. E.D. Tenn. 1989); and In re CC & Co., 86 B.R. 485 (Bkrtcy. E. D. Va. 1988). As noted by the district court in Li'l' Red Barn, Inc. v. Red Barn System, Inc., 322 F.Supp. 98, 107 (N.D. Ind. 1970), aff'd, 174 U.S.P.Q. 193 (7th Cir. 1972), "the rule is well established that a mere assignment for the future assignment of a trademark is not an assignment." [emphasis added]. Id. at 107.

The only case that truly can be said to offer support for the Trustee's position in the Petition is the copyright case of In re Peregrine Entertainment Ltd., 116 B.R. 194 (C.D. Cal. 1990).[3] Even though the decision is correct in its application to copyrights, this does not mean that its dictum on patents and trademarks is just as accurate. Of course, the Ninth Circuit had no trouble in distinguishing the Peregrine case. Cybernetic Services, supra, 252 F.3d. at 1056. (App. 29-30.)

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[3] The 1976 Copyright Act is quite comprehensive in its scope. See, the Copyright Act of 1976, as amended, 17 U.S.C. § 101-1101 (1994). Not only does it post-date the Uniform Commercial Code, but it expressly governs the substantive validity of security interests in copyrights, and defines a hypothecation or mortgage as a "transfer" of copyright ownership. See, 17 U.S.C. § 101 (1994). Therefore, Peregrine correctly held that the Copyright Act governs the substantive rights in security interests in copyrights as well as their filing. Peregrine, supra, 116 B.R. at 204. However, at least one bankruptcy court has recently held that a security interest in an unregistered copyright is to be perfected under state law by filing a Financing Statement with the Secretary of State. In re World Auxiliary Power Company, 244 B.R. 149 (Bkrtcy. N.D. Cal. 1999).

Unfortunately for the Trustee, the Petition must rely upon dictum in cases which nonetheless reached the correct result without any support of other decisions from Courts of Appeals, state appellate tribunals or any other court, for that matter, which have decided the issue in the Trustee's favor. It is abundantly clear that the issue presented by this case arose in the normal course of judicial proceedings and was uniformly decided in a manner consistent with all other published opinions on the subject. Therefore, this case does not merit review by this Court.

B. This Case Does Not Present Any Important Question Of Federal Law That Should Be Decided By This Court.

The Ninth Circuit was correct in holding that there is no federal scheme for registering security interests in patents under the provisions of the Patent Act. Cybernetic Services, supra, 252 F.3d. at 1048-55. (App. 12-26.) Indeed, the Petition does not take issue with the Ninth Circuit's thorough analysis of the preemption doctrine. Id. at 1045-48. Rather, the Trustee's argument makes a "stew" out of the legal terms and principles that have been used in connection with historic patent law in order to create such confusion that the only answer is to adopt a "belt and suspenders" approach, i.e., one that requires filing some sort of evidence of the security interest with the PTO. This approach has required transforming the security interest into an assignment or something else that will be recognized by the PTO. This is simply and plainly not a rational interpretation of the law.

In addition to the reasons set forth by the Ninth Circuit as to why there is no preemption by the Patent Act with respect to modern security interests, the real issue in this case involves the enforceability of Matsco's security interests against the bankruptcy estate. Indeed, the relief sought and the claims asserted by the parties in the bankruptcy court

were not created by the Patent Act, but by the provisions of the Bankruptcy Code. The Patent Act does not even address modern security interests much less the enforceability or "avoidance" of such interests.

This Court's opinions circumscribing the scope of federal jurisdiction illustrate the absence of an important question of federal law in this case. For instance, with respect to Federal Circuit Court jurisdiction over matters "arising under" the Patent Act, pursuant to 28 U.S.C. § 1338(a), this Court has held that the federal question must either prescribe the remedies sought, create the cause of action or involve a federal question "really and substantially." See, e.g., Feibelman v. Packard, 109 U.S. 421, 426 (1883); American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916); and Hopkins v. Walker, 244 U.S. 486, 489 (1917). Here, the Patent Act does not prescribe the remedies sought (i.e. – foreclosure or subordination); does not create the cause of action (i.e. – relief from stay or avoidance) or involve a question of federal patent law "really and substantially" (i.e. – the Patent Act did not create a system for the registration of security interests). The Trustee's limited defense to the Respondents' Motion for Relief from Stay in the Bankruptcy Court merely sought to establish a defect in the Respondents' lien through a failure to comply with some technical requirement. This requirement is alleged to be some sort of unidentified form of filing with the PTO. This technical defense is hardly an issue of significant federal interest that should fall within the boundaries of exclusive federal jurisdiction or be of interest to this Court. See, Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804 (1986).

In the instant case, the only applicable provision of the Patent Act that is relevant to the Petition is Section 261 which raises no substantial question of federal patent law. Beghin-Say International, Inc. v. Ole-Bendt, Rasmussen, 733 F.3d 1568 (Fed. Cir. 1984). In Beghin-Say, the Court of

Appeals decided that a request for a declaration that an assignment of patents was valid under Section 261 and invested with Beghin-Say all of the rights to the inventions, was a matter of state contract law. Id. at 1570-1. Therefore, it is hard to imagine how the contention that Section 261 creates some sort of a technical filing requirement for security interests would be any more susceptible to Federal Circuit Court jurisdiction or of interest to this Court. See also, Consolidated World Housewares, Inc. v. Finkle, 831 F.2d 261 (Fed. Cir. 1987) (the Patent Act does not create federal patent law jurisdiction over the question of inventorship). Indeed, the Federal Circuit has said that contract issues arising under Section 261 are "of monumental disinterest to the federal government." Beghin-Say, supra, 733 F.2d at 1572. In like manner, the questionable existence of some sort of a technical filing requirement for security interests under the provisions of Section 261 hardly raises a significant question of federal law.

C. The Ninth Circuit's Decision Makes No Change In Existing Law.

As noted above, all of the courts that have confronted the precise issue on this appeal have reached the same result by protecting the priority of lien creditors who perfected their liens in patents through filing in accordance with the Commercial Code. The Ninth Circuit's decision does not change this result. However, even assuming that the Trustee's "parade of horribles" exists in light of the Ninth Circuit's decision, absolutely nothing has changed. Secured creditors who share the Trustee's concerns for their welfare may continue to elect the "belt and suspenders" approach to perfecting their security interests. Nothing prevents such creditors from going through the machinations of transforming simple modern security interests into assignments or some other form of agreement that the PTO will recognize. There simply are no dire consequences to the

Ninth Circuit's decision which must be addressed by this Court.

II. THE NINTH CIRCUIT WAS CLEARLY CORRECT IN HOLDING THAT THERE IS NO NATIONAL SYSTEM FOR THE FILING OF SECURITY INTERESTS IN PATENTS.

As noted by the Court below, even the regulations of the PTO fail to recognize the existence of a federal system for the filing or registration of modern security interests. Cybernetic Services, supra, 252 F.3d. at 1056-57. The Trustee does not dispute the validity of the regulations and gives no explanation of how a filing system can exist without recognition by the PTO. Rather, these regulations merely highlight the failure of the Patent Act to create any federally recognized system for the filing of modern security interests.

A. The Patent Act Does Not Affect State Law On The Perfection Of Security Interests In Patents.

As noted in the Ninth Circuit's opinion, this Court has recognized that the Patent Act does not preempt every state commercial law which affects intellectual property. Aronson v. Quick Point Pencil Co., 440 U.S. 257, 262 (1979) ("State law is not displaced merely because the contract relates to intellectual property which may or may not be patentable; the states are free to regulate the use of such intellectual property in any manner not inconsistent with federal law.") See also, Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974).

The underlying fallacy of the Trustee's argument is that the scope of federal preemption afforded by the Patent Act is very limited. By its own terms, Section 261 of the Patent Act limits the registration requirements to ownership and assignments. Indeed, provisions of the California Commercial Code which provided for a "step back" from state law rules of perfection, where a "statute or treaty of the

United States which provides for national or international registration or a national or international certificate of title or which specifies a place of filing different from that specified in this division for the filing of a security interest," had a limited scope. Cal. Comm. Code § 9302(3)(A). Moreover, Section 9104(a) of the Commercial Code provided that Division 9 is inapplicable to a "security interest subject to any statute of the United States to the extent that such statute governs the rights of parties to and third parties affected by transactions in particular types of properties." In other words, this section required that a security interest be subject to a federal statute and that the federal statute govern the rights of the secured parties and third parties before the "step back" of Division 9 as a whole was triggered.

The Trustee's effort to collapse the distinction between ownership and security interests would require the "step back" whenever a federal statute provides a national system for registration of title even if its fails to mention security interests. However, neither the California Commercial Code nor the applicable case law supports such an interpretation. Federal and state statutes pertaining to the same subject matter do and must coexist. Similarly, the modern concept of title ownership to personal property is and must remain a fundamentally different right and legal concept from a mere security interest under a modern application of commercial law. 4 White & Summers, Uniform Commercial Code § 30-1 (4th ed. 1995). By and large, the Trustee's argument simply seeks to universalize the preemptive scope of the Patent Act by creating a confusing "stew" of legal principles and issues that are so intertwined as to lack any sort of definition.

B. The Petition Uses Inapplicable Case Law And Ancient Principles In An Effort To Blur Modern Legal Distinctions Between Ownership Rights And Security Interests.

Rather then accept the Ninth Circuit's interpretation of this Court's opinion in Waterman v. Mackenzie, 138 U.S. 252 (1891), the Trustee continues to argue for a different construction of that case. Indeed, the Petition now claims that "[s]ince its enactment, Patent Act § 261 has covered a 'collateral assignment' or 'mortgage'" citing Waterman. (Petition, p.8.) However, neither Waterman nor Section 261 use the term "collateral assignment." This attempt to recharacterize the historic meaning of the terms "assignment, grant or conveyance" is insupportable and misleading. As noted by the Ninth Circuit, Congress used unambiguous terms and "intended to incorporate the common, contemporaneous meanings of the words" in enacting the Patent Act. Cybernetic Services, supra, 252 F.3d at 1050. (App. 16). The attempt to blur modern distinctions between ownership and security interests is nothing more than an effort to bring current commercial practices back into the 1890s. There is no supportable rationale for this Court to do so.

In a similar fashion, the Trustee's Petition asserts that equitable title and equitable assignments are the same as modern security interests so, therefore, modern security interests must be recorded with the PTO. Once again, the Trustee's Petition ignores the progress of legal history in an attempt to blur distinctions that clearly exist in modern commercial practice. See, 1C Peter F. Coogan, et. al., Secured Transactions Under the Uniform Commercial Code § 25.08[3][b][iii] (1999). This argument reaches its extreme when the Trustee argues that the "right to take legal title on foreclosure is an ownership interest." (Petition, p. 15.) This statement is simply false. It ignores the entire foreclosure process in which anyone bidding at the foreclosure sale may

acquire title and record its ownership interest with the PTO. The right to foreclose is a remedy for obtaining payment, not an exclusive right to obtain title to the collateral. See generally, Cal. Comm. Code, §§ 9-501 through 9-506.

The Trustee's argument consistently ignores the practical application of modern commercial law and ignores such niceties as the procedures to be followed in the foreclosure process and the priorities among the competing lienholders. See, 1C Coogan, supra, at § 25.08[3][b][iii]. Indeed, virtually all of the important questions of lien priority are left unanswered by the Patent Act simply another indication that it was never intended to address security interests.

III. THE TRUSTEE'S "STRONG ARM" POWERS UNDER THE BANKRUPTCY CODE ARE NOT RELEVANT TO THE RESULT BELOW.

As noted above, the real issue before the bankruptcy court was the enforceability of Matsco's security interests against the bankruptcy estate. As stated by the bankruptcy court in its Conclusions of Law, the "parties have agreed that a determination as to whether Matsco has a perfected security interest in the patent is dispositive of Matsco's relief from stay motion. As Matsco perfected its security interest in the patent before the filing of the bankruptcy petition, Matsco's interest in the patent has priority over the trustee's claim in a patent." (App. 47.) The Court never reached the issue of what "strong arm" or "avoidance" power would be used by the Trustee if Matsco's security interests were unperfected.

A. The Trustee Waived Arguing His Status As A Bona Fide Purchaser With Respect To Patents.

The Petition does not dispute that the Trustee's "strong arm" powers were not specifically addressed in the bankruptcy court nor argued to the Bankruptcy Appellate

Panel on appeal. Rather, the Trustee argues that by some inference from the nature of the argument below its current contentions should have been anticipated. (Petition, pp. 24-25.)

On the contrary, not only could no one anticipate that the Trustee would argue that he has the status of a bona fide purchaser of a patent (as discussed more fully below), but there is no relevance to the application of the "strong arm" powers unless the Respondents' liens are unperfected. The Trustee's attempt to argue from his conclusion that, since the Trustee allegedly is imbued with the status of a bona fide purchaser, the liens he is avoiding also must be "purchases" of the patent itself and thus covered by the Patent Act, is absolutely fallacious. This argument is so illogical and so far removed from what was contemplated in the argument before the bankruptcy court and subsequent appeal that the Ninth Circuit was absolutely correct in dismissing the issue as having been waived. (App. 5, n. 3.)

B. The Trustee Is Not A Bona Fide Purchaser Of Patents Under Section 544(a)(2) Of The Bankruptcy Code.

Even if the Trustee had not waived this argument of bona fide purchaser status and it was somehow relevant to the decision below, the Trustee's argument is plainly and simply wrong. Section 544(a) imbues the Trustee with the rights and powers of "a bona fide purchaser of real property" but not personal property. 11 U.S.C. § 544(a)(3). The fact that Congress gave the Trustee the status of a bona fide purchaser of real property, but not personal property demonstrates its intent to treat personal property differently. See, In re Hilda, 120 F.3d 950, 955 (9th Cir. 1997). Rather, with respect to personal property, the Trustee is imbued with the status of only a judgment lien creditor or an execution creditor whose execution was returned unsatisfied. 11 U.S.C. § 544(a)(1)

and (2). This does not automatically provide status as a bona fide purchaser.

The Trustee misleads the Court on this issue by citing cases involving his hypothetical judgment lien creditor status under Section 544(a)(1) for the proposition that he is a bona fide purchaser under section 544(a)(2). See, Sampsell v. Straub, 194 F.2d 228, 231 (9th Cir.Cal. 1951) cert. den. 343 U.S. 927 (1952) and In re Peregrine Entertainment Ltd., 116 B.R. 194, 207 (C.D. Cal. 1990). (App. 22-23.) Both of these cases assume that the Trustee had recorded abstracts of judgment because this is the method of creating the judicial lien which is provided for under Section 544(a)(1). However, Section 544(a)(2) only says that the Trustee has the status of an execution creditor whose execution has been returned unsatisfied, not a bona fide purchaser of personal property. The Trustee should not be permitted to write words into the statute that are not there.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: January 3, 2002

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Attorneys for Respondents, Cupertino National Bank, as successor in interest to MATSCO, INC. and MATSCO FINANCIAL CORPORATION

Former California Commercial Code (2000):

California Commercial Code § 9104(a) and § 9302(3)(a):

§ 9104. Transactions excluded from division

(a) A security interest subject to any statute of the United States to the extent that such statute governs the rights of parties to and third parties affected by transactions in particular types of property.

California Commercial Code § 9302(3)(a):

§ 9302. When Filing Is Required to Perfect Security Interest; Security Interests to Which Filing Provisions of This Division Do Not Apply

. . .

(3)(a) A statute or treaty of the United States which provides for a national or international registration or a national or international certificate of title or which specifies a place of filing different from that specified in this division for filing of the security interest.